Supreme Court, U.S.
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Case No. 93-1376

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF FLORIDA,

Petitioner,

v.

EDWARD POUGH, ANTHONY Q. SINGLETON, AND ALBERT HICKSON

Respondents.

SUPPLEMENTAL BRIEF ON WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

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SUPPLEMENTAL REASONS FOR GRANTING WRIT

The Petitioner files this supplemental brief pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States. This Court is currently considering the Petitioner's writ of certiorari in *Florida v. Pough,* Case No. 1376. The appendix of this supplemental brief includes: 1) a copy of the state court of appeal per curiam opinion affirming the trial court's granting of the Defendant's motion to suppress, *State v. Ponder,* Case no. 93-1054 (Fla. 1st DCA Mar. 29, 1994) [A-1]; and 2) copies of the briefs argued before the state appellate court [B 1-49].

The attached supplemental authority shows that it is the continuing practice of the Florida court of appeals to abrogate consent searches by requiring reasonable suspicion of criminal activity in order to ask for consent to search. Like the opinion in *Pough,* the state court of appeal in *Ponder* issued a per curiam affirmance opinion without written text. Therefore, the district court again evades review of this important constitutional issue of whether a police officer must have reasonable suspicion in order to ask for consent to search a vehicle.[1]

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1 The Florida First District Court of Appeal rendered *State v. Ponder,* Case No. 93-1054 (Fla. 1st DCA Mar. 29, 1994), a per curiam affirmance, without a written opinion, on March 29, 1994. Review is not pending in the Florida Supreme Court because the court does not have jurisdiction over an unexplained per curiam affirmed decision which does not expressly and directly conflicts with the decision of another state district court of appeal. *Jenkins v. State,* 385 So. 2d 1356 (Fla. 1980).

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

JOHNNY PONDER,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

Opinion filed March 29, 1994.

An appeal from the Circuit Court for Alachua County.

Nath C. Doughtie, Judge.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for Appellant.

Nancy A. Daniels, Public Defender; Paula Saunders, Assistant Public Defender, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

BOOTH, ALLEN and WEBSTER, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 93-01054

JOHNNY PONDER,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 93-01054

JOHNNY PONDER,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, State of Florida, prosecuting authority below, will be referred to herein as "appellant" or "the state." Appellee, Johnny Ponder, defendant below, will be referred to herein as "appellee" or "Ponder." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE

The state on September 14, 1992 charged appellee Johnny Ponder with possession of cocaine, in violation of section 893.13(1)(f), Florida Statutes (1991), and possession of cannabis, in violation of section 893.13(1)(g), Florida Statutes (1991). (R 17-18) Appellee filed a motion to suppress evidence seized during a consent search of his vehicle on grounds that the vehicle stop was pretextual, the consent was not knowingly, intelligently, freely and voluntarily obtained, and the search exceeded the scope of the consent. (R 20-22) Following a March 17, 1993 hearing, the trial court granted the motion on the authority of *Springle v. State,* 613 So.2d 65 (Fla. 4th DCA 1993). (R 23-25) The state timely appealed the order granting the motion.

STATEMENT OF THE FACTS

Alachua County Sheriff's Deputy James J. Troiano was the sole witness at the hearing on the motion. (T 5-45) Troiano testified that he had been a deputy sheriff for approximately four and three-quarter years. (T 5) He effected a traffic stop on August 26, 1992 on 10 p.m. on I-75 after he observed a white Oldsmobile traveling south on the interstate engage in a serpentine weave over the center line several times. (T 6) Troiano observed the vehicle cross the line in a flagrant manner, approximately six to eight inches of weave, with the tire over the line on the right side of the road. (T 6) Troiano observed the vehicle engage in this driving pattern for about a mile or a mile and a half. (T 6) Troiano stopped the vehicle because he felt the driver might be impaired by tiredness or intoxication. (T 7) When the car pulled over to the side of the road, Troiano used his P.A. to ask the driver to step out with his driver's license. (T 7) The driver exited the vehicle. (T 7) Troiano identified him as Johnny Ponder from his Georgia driver's license. (T 7) Troiano advised Ponder that he stopped him for failure to maintain his lane. (T 8) Ponder advised Troiano that he knew why Troiano had stopped him, and that he had been distracted by the female passenger in the front seat of his car. (T 8) The passenger was seated in the car. (T 8) Troiano asked Ponder for the car registration, which Ponder retrieved from the trunk. (T 8) Ponder told Troiano that he was going to St. Augustine, Florida, from Atlanta, Georgia. (T 8) Troiano asked Ponder why he was taking a roundabout route to St. Augustine. (T 8) Ponder stated that he was going to spend the night with his girlfriend's friends in Gainesville. (T 8) Ponder did not know who the friends were. (T 8) Ponder stated that he and his girlfriend would go to St.Augustine the next day to spend the weekend at St. Augustine, and then return to Atlanta on Sunday. (T 8) Troiano decided to issue Ponder a warning citation for failure to maintain a single lane. (T 9) Troiano had issued

other citations for failure to maintain a single lane in the past. (T 9) Troiano's practice when he observed such a driving pattern was to give either a verbal or written warning, or issue an actual citation. (T 9) Troiano had no reason then to suspect that Ponder was engaging in any narcotics activity. (T 10) Prior to completing the warning citation, Ponder approached the vehicle and talked with the passenger. (T 10) Troiano spoke with the passenger to check on her safety, and to make sure everything was alright between her and Ponder. (T 10) The passenger, Daria Caprice Wilson, appeared very nervous. (T 10) When Troiano asked Wilson where she and Ponder were going, she did not answer. (T 10) Troiano asked her again, and Wilson pointed to Gainesville on a map she was holding. (T 10) Troiano asked Wilson where she was going in Gainesville, and Wilson stated she did not know. (T 10) During his conversation with Wilson, Troiano noticed a package of rolling papers sticking out of Wilson's right pocket. (T 11) When Troiano asked Wilson if the rolling papers were hers, she said yes. (T 11) Troiano then went back to Ponder and issued him the citation. (T 11) Troiano then released Ponder from the traffic stop. (T 12) As Ponder approached his vehicle, Troiano asked him for consent to search the vehicle, and whether he had any guns, weapons drugs or contraband in the car. (T 12) Ponder appeared frightened or scared and kind of staggered back from Troiano a little bit. (T 12) Ponder said yes to the requested search, and he denied having drugs on him. (T 12) Ponder understood the request, in Troiano's opinion. (T 12) In Troiano's opinion, the consent was freely and voluntarily given. (T 13) Troiano then asked Ponder to stand at the front of the patrol car as Troiano made contact with Wilson. (T 13) Troiano informed Wilson that Ponder had consented to a search of the car. (T 13) When Troiano asked Wilson whether she had any property in the car, she stated she did. (T 13) When Troiano asked Wilson her for consent to search her property, Wilson said yes. (T 13) Wilson appeared to

understand Troiano's request and to freely and voluntarily give her consent. (T 13) Troiano then asked Wilson to step back to the patrol vehicle. (T 14) Troiano requested a backup officer, Sergeant Lee, who arrived within minutes. (T 14) For security reasons, Troiano did not commence the search until Lee arrived. (T 14) Troiano found cannabis residue on the floorboard in the right front passenger area. (T 14) Troiano asked Wilson if she knew what the substance was, and she stated she did. (T 15) Troiano then asked Wilson to step back to the front of the patrol car, and advised her of her *Miranda* rights. (T 15) Troiano informed Wilson and Ponder that he was conducting a criminal investigation as to the location for the cannabis on the floorboard. (T 15) Neither Ponder nor Wilson revoked their consent after Troiano read them their *Miranda* rights. (T 15) Troiano then asked Ponder and Wilson to sit in the rear of the patrol car. (T 15) Troiano activated a video recorder to record conversations in the patrol car. (T 15) Troiano and Lee approached the vehicle, and Troiano asked Lee to search the trunk area. (T 16) Troiano continued to search the passenger area. (T 16) Troiano located a cannabis pipe with residue and a ball cap with a cannabis roach inside it under the right passenger seat. (T 16) Troiano was able to identify the substance based on his experience and training. (T 16) In a search of Wilson's purse, Troiano found a cannabis stem with cannabis residue. (T 17) Troiano then searched the rear passenger portion of the car. (T 17) Troiano noticed a panel on the rear door which was not factory-installed. (T 17) Troiano noticed that the vent on the doorsill was pop-riveted into place rather than stapled with a clip and screw. (T 18) These unusual features signified that someone had tampered with the area of the car and that there was a compartment in the vehicle. (T 18) After Troiano discovered the compartment, he asked Lee for assistance. (T 19) Troiano popped the latch on the compartment to open it. (T 21) Troiano found a can of cat and dog repellant and several rolls and sheets of fabric

softener. (T 21) Troiano knew from experience that the fabric softener and dog repellant were used to deflect attention of drug dogs from the area of the compartment. (T 22) A drug dog was never utilized in this case. (T 22) After a search of the other side of the vehicle, Troiano and Lee located the same type of compartment, and opened it. (T 23) They found a bag of suspected powdered cocaine. (T 23) Before Troiano opened the second compartment, he suspected contraband in the car based on the panel being riveted, the professional job on the compartments, and the items used to throw off the drug dogs. (T 23-24) Troiano also found a bag of cannabis on Ponder and four bundles of money and a bag of money underneath a drawstring bag of cocaine inside the second compartment. (T 25) Troiano and Lee then arrested Ponder and Wilson, handcuffed them and placed them in the back of the patrol car. (T 26)

On cross-examination, Troiano testified that he followed appellant's vehicle for approximately 45 to 90 seconds. (T 28) Troiano spoke with the passenger after he decided to issue a warning for weaving within the lane. (T 30) It was Troiano's custom to speak with a passenger when he was issuing a warning citation. (T 30) Troiano used his conversation with the passenger to supply probable cause for further investigation. (T 30) Troiano observed the passenger's nervousness and heard her tell a story which conflicted with appellant's version of where they were headed. (T 30) Troiano requested Sergeant Lee to respond to his location after he issued the warning citation to appellant and returned appellant's license. (T 32) Troiano asked for consent to search after he had issued the warning. (T 31) Troiano asked for Lee's presence before he sought appellant's consent to search. (T 33) Troiano might have issued a warning citation for weaving approximately four or five or possibly more times in the four years he had been a sheriff with the Alachua County Sheriff's Department. (T 33) Appellant's driving placed other vehicles, property or persons in danger.

(T 34) Appellant was not under arrest when Troiano placed him in the back of the patrol car, but he was not free to go. (T 35) Troiano made a videotape recording of whatever was said in the patrol car. (T 35) Troiano did not save or preserve that suspected cannabis residue which he located in the front passenger seat area. (T 35) Troiano could not gain access to the secret compartment without a tool. (T 36) Troiano did not ask for a separate consent to search that area. (T 35) Troiano did have a fear for his safety at the time he requested appellant's consent to the search. (T 37) Troiano was involved in Case No. 91-2775, *In re Forfeiture of $49,945,* in which Troiano stopped a vehicle with a Florida tag on I-75 for following too closely and speeding. (T 39) Troiano also stopped a defendant named Brody on I-75 and obtained a consent to search. (T 39) Troiano also stopped a Mr. Whitaker on I-75 for failure to maintain a single lane and obtained his consent to search. (T 40) Troiano also stopped defendants Smith, Dixon, and La Quinta on I-75 and obtained their consent to search. (T 40-41)

On redirect, Troiano testified that approximately five or six minutes elapsed between the initial stop of the vehicle and the time he first saw the marijuana on the seat of the car. (T 42) Approximately 20 minutes elapsed between the initial stop and Troiano's discovery of cocaine in the secret compartment. (T 43) Troiano believed that based upon the marijuana he found in the front seat of the car, he had probable cause to arrest at least the passenger of the vehicle. (T 43) Troiano did not inform appellant that he had the right to refuse the request to search. (T 44) Appellant and the passenger were seated in the back of the patrol car for perhaps 45 minutes at the scene of the stop. (T 45)

The trial court on March 19, 1993 issued a written order granting the motion on authority of *Springle v. State,* 613 So.2d 65 (Fla. 4th DCA 1993), apparently concluding that while the stop of appellant's vehicle was lawful and not

pretextual, the continued detention of appellant and the passenger was improper, and the consent to search was not voluntarily obtained. The court did not rule on the propriety of the scope of the search. The state timely appealed the denial of the motion.

SUMMARY OF ARGUMENT

Because police possessed an articulable reasonable suspicion of ongoing criminal activity, the continued detention of appellee and his companion beyond the time required to issue the warning citation was not unlawful. No evidence supports a conclusion that the consent to search the vehicle was not voluntarily obtained. Although the court did not reach the issue of the scope of the search, the search of the secret compartment was proper under *New York v. Belton, infra,* and *Florid v. Jimeno, infra*. Unlike in *Springle v. State, infra,* police had probable cause to arrest appellee and the passenger prior to placing them in the back of the patrol car, and advised them of their *Miranda* rights prior to video recording their statements. Because the trial court applied an improper legal standard, the order should be reversed.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS.

The trial court erred in concluding that the detention of appellant's vehicle after issuance of the warning citation was unlawful, and that the consent to search was not voluntarily obtained.

In *Springle v. State,* 613 So.2d 65 (Fla. 4th DCA 1993), upon which the trial court relied in granting appellee's motion to suppress, police stopped the defendants' vehicle on I-95 for speeding 8 miles over the speed limit, and then conducted a search of the vehicle pursuant to the defendants' consent. Without a reasonable suspicion of criminal activity or probable cause to support an arrest, police requested the defendants to sit in the back of the police car, where they made incriminating statements. The district court siting *en banc* found the traffic stop to be valid and non-pretextual under principles enunciated in *Kehoe v. State,* 521 So.2d 1094 (Fla. 1988), but the subsequent detention of the defendants after the requested consent to search unlawful. The court, in addition, concluded that the defendants possessed a reasonable expectation of privacy in their oral communications in the back of a police car. Finally, the court certified two questions to the Florida Supreme Court as to whether placing a defendants in a locked police vehicle constitutes a seizure and whether one may possess a reasonable expectation of privacy in oral communications made in the back of a police car. *State v. Springle,* Case No. 81,138, currently is pending before the Florida Supreme Court on the certified questions.

Based on the analysis conducted by the court in *Springle,* the court in this case apparently concluded that while the

initial stop of appellee's vehicle was lawful and not pretextual, the subsequent detention of appellant in the back of the police car following the consent to search was unlawful. As will be shown *infra,* however, the facts of this case differ so significantly from those in *Springle* that that decision cannot support the suppression order.

The facts here establish that after Deputy Troiano determined that appellee was not impaired, he spoke with the passenger in the vehicle to determine that no problem existed between her and appellant. Appellee advised Troiano that he was driving erratically because his companion was distracting him. While talking with the passenger, Troiano noted that she was nervous, and that her answers to his questions contradicted those provided by appellee. While Troiano spoke with the passenger outside the passenger door, he observed a package of rolling papers sticking out of the passenger's pocket. Troiano asked the passenger if the papers were hers, and she said yes. Troiano then issued the warning citation to appellee, considered the traffic stop concluded, and asked for consent to search the car. Appellee gave his consent to the search. Troiano then advised the passenger that he had consent to search the vehicle, and asked for consent to search her property. She said yes. Troiano asked her to exit the vehicle. In searching the area where the passenger had been sitting, Troiano found cannabis residue on the doorjamb of the vehicle. Troiano pointed out the substance to the passenger and asked if she knew what it was, and she stated, yes. Troiano then advised the passenger and appellee of their *Miranda* rights, and advised them that he was conducting a criminal investigation as to the cannabis. Troiano advised appellee of this fact. Troiano also advised appellee of his *Miranda* rights. Only after *Mirandizing* the two, and advising that he was conducting a criminal investigation, did Troiano request the two to sit in the back of the patrol car for the duration of the search.

A traffic stop must last no longer than the time it takes to write the traffic citation. *Cresswell v. State,* 564 So.2d 480 (Fla. 1990); *State v. Johnson,* 479 So.2d 816, 818 (Fla. 4th DCA 1985). To justify a detention beyond the time needed to issue a citation, the officer must have a reasonable suspicion based on articulable facts that criminal activity "may be afoot." *Cresswell,* 564 So.2d at 481, citing *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 11884, 20 L.Ed. 2d 889 (1968). Reasonable suspicion is defined as something less than probable cause, but more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.* In determining whether an officer has reasonable suspicion sufficient to justify a temporary investigative detention,

> the totality of circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officer must have a particularized and objective basis of suspecting the particular person stopped of criminal activity.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Cresswell, 564 So. 2d at 482, quoting *United States v. Cortez,* 449 U.S. 411,417-18, 101 S.Ct. 690, 694-95, 66 L.Ed. 2d 621 (1981).

Following the valid non-pretextual stop of appellee's vehicle, Troiano observed facts sufficient to form an articulable reasonable suspicion of criminal activity. He observed

the passenger's nervousness and her conflicting version of where she and appellee were headed. He observed in plain view rolling papers sticking out of the passenger's pocket. These facts supplied Troiano with a reasonable suspicion that criminal activity was afoot, and therefore gave him grounds for detention of appellee and the passenger beyond the issuance of the warning ticket. *Cresswell.*

Based on his reasonable suspicion, Troiano then requested a backup unit. He issued a warning citation to appellee, considered the traffic stop terminated, and asked for consent to search the vehicle. Whether a suspect consents to a search is a question of fact to be determined by the totality of circumstances. *Davis v. State,* 594 So.2d 264 (Fla. 1992). When no police misconduct precedes a consent to search, the state must establish the voluntariness of the consent by a preponderance of evidence. *Denehy v. State,* 400 So.2d 1216 (Fla. 1980). When illegal police activity precedes a consent to search, a presumption that the consent is tainted by the illegal activity, and therefore involuntary, arises. *Bailey v. State,* 319 So.2d 22 (Fla. 1975). Among the factors considered in assessing the totality of circumstances surrounding a defendant's consent to search are the defendant's age, education, intelligence, advice by police on his constitutional rights, and the prolonged nature of questioning. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed. 2d 854 (1973); *Louis v. State,* 567 So.2d 38 (Fla. 3rd DCA 1990). Although knowledge of one's right to refuse to consent to a search without a warrant is one factor to be considered in determining whether the consent was freely and voluntarily obtained, there is no *per se* requirement that a defendant must be informed of such right. *Schneckloth v. Bustamonte; Acosta v. State,* 519 So.2d 658 (Fla. 1st DCA 1988). The state must establish voluntary consent as opposed to a defendant's mere submission to authority. *Rossell v. State,* 433 So.2d 1260 (Fla. 1st DCA 1983). The determination of whether a consent to search was voluntary should

not be disturbed on appeal unless the determination is clearly erroneous. *Id.*

The court in this case did not expressly rule on the consent issue. The court in *Springle* similarly did not rule on whether the defendants' consent, obtained, as in this case, after issuance of the traffic citation, was voluntary.

However, it is clear that no evidence exists in the record to support a conclusion that the consent of either appellee or the passenger was not voluntarily obtained. The record indicates that appellee was 23 years old at the time of the stop, and that he fully understood Troiano's request. While Troiano did not advise appellee that he had a right to refuse the request to search, that fact is not determinative. The trial court's order appears to imply that because Troiano considered the traffic stop concluded, his attempt to obtain consent to search thereafter was improper and therefore rendered the consent involuntary. No case law is found to support a conclusion of involuntariness under these circumstances. Moreover, while Troiano had the right to request consent to search under any circumstances after the conclusion of the traffic stop, the propriety of his request is strongly bolstered by the fact that he possessed a reasonable suspicion of criminal activity at the time he sought consent to search. His reasonable suspicion afforded Troiano not only the unquestionable right to request consent, but also to detain the suspects.

The fact that Troiano possessed an articulable reasonable suspicion of criminal activity prior to requesting either a backup unit or consent to search, significantly distinguishes this case from *Springle*. In *Springle*, the officer detained the defendants beyond the traffic stop without *any* reasonable suspicion that criminal activity was afoot. Here, precisely the opposite situation existed.

Moreover, police in *Springle* did not obtain any incriminating evidence against the defendants until they recorded the defendants' statements in the back of the patrol car. Here, police uncovered contraband in their search of the vehicle. Appellee and his companion were not placed in the back of the patrol car until *after* cannabis residue was found in the front passenger area of the car. After finding the cannabis residue, Troiano asked the passenger if she knew what it was, and she stated she did. Troiano then *Mirandized* her and appellee. At that point, he placed the two in the back of the patrol car. The two remained in the car for the duration of the search. Thus, if probable cause is required to place suspects in the back of a patrol car, as *Springle* appears to suggest, probable cause to arrest existed in this case.[1]

The trial court did not reach the issue of whether the search was within the scope of the consent given. However, the search of a compartment affixed to the interior of the vehicle, contained within the interior shell of the vehicle, covered with regular car upholstery to make it appear to be part of the interior side door, was authorized both by the consent and as incident to arrest.

Police who have legitimately stopped a vehicle, and who have probable cause to believe contraband is concealed somewhere within it may conduct a warrantless search of *every* part of the vehicle and its contents, including containers and packages that may conceal the object of the search. *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.

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1 The court in *Springle* characterized the placement of the defendants in the back of the police car as incarceration without "probable cause." 613 So.2d 65 The court's reference to a probable cause standard under these circumstances appears to be misplaced. Police need only a reasonable suspicion of criminal activity to detain suspects. Temporarily placing suspects in the back seat of a patrol car during a vehicle search along an interstate highway is not tantamount to an arrest requiring probable cause.

2d 572 (1982). Here, Troiano and Lee did possess probable cause to believe that drugs were concealed somewhere in the car. Troiano had already *Mirandized* appellee and his passenger, and effectively placed them under arrest for the drugs he had found in the passenger compartment.

The search of the secret compartment was within the scope of appellee's unrestricted consent to search the interior of the vehicle. In *Florida v. Jimeno,* ___U.S. ___, 111 S.Ct. ___, 114 L.Ed. 2d 297 (1991), the U.S. Supreme Court held that the search of a paper bag on the floorboard of the defendant's vehicle, following his consent to search the interior of the vehicle, was lawful under the Fourth Amendment. The court stated:

> The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect. *Illinois v. Rodriguez,* 497 U.S. ___, 111 L.Ed. 2d 148, 110 S.Ct. 2793; *Florida v. Royer,* 460 U.S. 491,501-502, 75 L.Ed. 2d 229, 103 S.Ct. 1319 (1983).... The question before us, then , is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.

Id., 114 L.Ed. 2d at 302. The court in *Jimeno* noted that the defendant did not place any explicit limitation on the scope for the search. Here, appellee similarly placed no restriction on the scope of the search. Troiano observed that the interior back side panels of the vehicle had been tampered with. These panels were part of the interior of the vehicle, rather than containers, and Troiano possessed an objectively reasonable expectation that they contained the drugs for which

he was searching. *See Ross* (The scope of a search is generally defined by its expressed object.).

The search of the compartment was also authorized as incident to arrest. *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981). In *State v. Loftis,* 568 So.2d 121 (Fla. 5th DCA 1990), the court discussed this exception to the warrant requirement as follows:

> According to the Supreme Court in *Belton,* "...when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Moreover, the officer may examine the contents of containers found within the passenger compartment which are considered to have been within reach of the arrestee. *Belton,* 101 S.Ct. at 2864. The Court pointed out that this holding was consistent with the requirement in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), that the object searched be "within the arrestee's immediate control." *Belton* established a bright-line test of what is in an automobile occupant's immediate control: the entire passenger compartment of the automobile. [footnote omitted]

Loftis, 568 So.2d at 122. The fact that appellee and the passenger were not formally arrested until after the search is immaterial since Troiano possessed probable cause to arrest even before the search. *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L. Ed. 2d 633 (1980); *State v. Pringle,* 499 So.2d 75 (Fla. 2nd DCA 1986).

The trial court also did not expressly reach the question of whether appellee and the passenger possessed a reasonable expectation of privacy in their oral communications in

the back of the patrol car.[2] The *Springle* court held that the defendants in that case did have a reasonable expectation of privacy in their statements made in the patrol car, but the court hinged that conclusion on the fact that police did not possess either a reasonable suspicion of criminal activity or probable cause to justify the detention in the back of the patrol car, stating

> When the police offer succor and shelter to Florida citizens, neither under arrest nor even articulable suspicion, we believe that the democratic society in which we live would expect that its conversations not be secretly recorded by law enforcement.

Id., 613 So.2d at 68.

Here, police possessed probable cause to arrest appellee and his companion at the time they were placed in the patrol car. Troiano advised appellee and his companion of their *Miranda* rights prior to placing them in the police car. Neither appellee nor his companion expressed a desire to exercise their Fifth Amendment rights. Under these highly distinguishable circumstances, appellee and his companion did not possess an expectation of privacy which could be characterized as objectively reasonable.

Because the court applied the wrong legal standard in granting the motion to suppress, this court should reverse the order.

---

2 While suppression of the videotaped statements was requested in the motion to suppress, no evidence as to the substance of the statements was presented at the motion hearing.

CONCLUSION

Based on the foregoing argument and citations of authority, appellant requests this court to reverse the order granting the motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing amended initial brief has been furnished by U.S. Mail to Nancy Daniels, Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301 this 14th day of July, 1993.

Laura Rush
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant, **CASE NO.: 93-1054**

vs.

JOHNNY PONDER,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs. CASE NO.: 93-1054

JOHNNY PONDER,

Appellee.

_____/

ANSWER BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellee, JOHNNY PONDER, was the defendant in the lower court and will be referred to in this brief as appellee or by his proper name. Appellant, the State of Florida, was the prosecuting authority and will be referred to as appellant or the State.

The record on appeal will be referred to herein as "R" followed by the appropriate page number in parenthesis. The transcript of proceedings will be referred to as "T." Appellant's Amended Initial Brief will be referred to as "IB."

II STATEMENT OF THE CASE AND FACTS

Appellee generally accepts appellant's Statements of the Case and Facts with the following additional facts and clarifications.

Appellee moved to suppress physical evidence and audio or video recordings seized pursuant to a search of his vehicle on the grounds that the vehicle stop was pretextual; the continued detention of appellee after the traffic warning had been issued was illegal; any purported consent to a search or the vehicle was not knowingly, intelligently, freely and voluntarily given; and even if the consent to search was valid, the search itself exceeded the scope of consent (R 20-22).

After Deputy Troiano released Mr. Ponder from the traffic stop, and Ponder was returning to his vehicle, Troiano called out to him, "Mr. Ponder, I'd like to ask you if you have any guns, any weapons, any drugs or contraband in your car" (T 12). According to Troiano, Ponder appeared frightened and replied, "Yes, you can search the car," and "No," implying that he did not have any contraband in the vehicle (T 12). At that point, Troiano informed the passenger that Ponder had consented to search her property as well (T 13). Troiano never informed Mr. Ponder that he had a right to refuse consent (T 44).

Troiano was not able to open the customized compartment in the vehicle by hand and could not locate any devices inside the car to activate the latch. He had to force open the compartment with a screwdriver he retrieved from his patrol vehicle (T 20). He similarly forced open the second compartment on the other side of the vehicle where the cocaine was located (T 23). Troiano did not ask Ponder for consent to enter the compartment (T 36).

Deputy Troiano requested a back-up unit after he completed the warning citation but before he gave it to Ponder and before he asked for consent to search the car (T 32-33). Ponder and his passenger were detained approximately 45 minutes or longer before their arrests (T 45).

The trial court granted the motion to suppress, concluding that the initial stop was to a pretext, but that the continued detention of Ponder and his passenger was unlawful and the consent to search was not voluntary (R 23-25).

SUMMARY OF ARGUMENT

The record shows that a deputy sheriff stopped appellee's vehicle on the interstate ostensibly because of a traffic violation. After writing a warning citation, but before handing it to appellee and returning appellee's driver's license, the deputy called for back-up. He then released appellee from the traffic stop, but before appellee could depart from the scene, the officer asked for consent to search the vehicle. Appellee was then detained until the back-up unit arrived, whereupon he and his passenger were placed in a patrol car and an extensive search of the vehicle ensued.

The trial court ruled that the initial stop was valid but that both the continued detention of appellee and the consent to search were invalid.

Initially, appellee maintains that the initial stop cannot be justified on the grounds that it was a valid traffic stop. A stop is pretextual when a reasonable officer would not have made the stop absent an improper motive. Whether a reasonable officer would have stopped appellee's car turns on a consideration of all the facts and circumstances confronting the officer at the time of the initial stop. Appellant failed to sustain its burden of showing that a *reasonable* officer would have made this traffic stop after observing the vehicle weaving on the highway for only a minute. The initial stop was a pretext under the standards of *Kehoe v. State, infra.*

Even assuming the stop was valid, however, the trial court correctly held there was no reasonable suspicion to justify the continued detention of appellee and his passenger, and that the illegal detention, coupled with the officer's failure to advise appellee of his right to refuse consent to search, tainted his purported consent. Case law states that a traffic stop should not take longer tan is necessary for the officer to write a citation. *Cresswell v. State, infra.* Here, the officer issued a warning citation and released appellee from the

traffic stop, but then detained him until a back-up unit arrived and for the purpose of searching the vehicle. This contained detention was illegal, and the search was conducted during the illegal detention. Thus, the court correctly suppressed the evidence seized during the illegal search, notwithstanding appellee's apparent consent.

When consent has been obtained after an illegal detention, the unlawful stop presumptively taints and renders involuntary any consent to search. The state has the burden of showing, by clear and convincing evidence, the defendant freely and voluntarily consented to the search. The state has failed to carry its burden here.

Thus, the trial court properly granted appellee's motion to suppress, and that ruling should be affirmed.

IV ARGUMENT

ISSUE PRESENTED

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO SUPPRESS.

In *Sheff v. State,* 301 So. 2d 13, 14 (Fla. 1st DCA 1974), this Court observed:

> [O]n a motion to suppress evidence the trial judge is trier of both law and fact. His conclusions come to us clothed with a presumption of correctness, and in testing the accuracy of his conclusions on questions of fact we must interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to the conclusions reached by him.

Because the trial court is the trier of both fact and law, where, as here, the court *grants* a motion to suppress, the record on appeal must be viewed in the light most favorable to the successful movant, with all conflicts in evidence resolved in his favor. *State v. Williams,* 371 So. 2d 1074 (Fla. 3d DCA 1979(; *and State v. LaGree,* 595 So. 2d 1029 (Fla. 1st DCA 1992) (order granting motion to suppress is presumptively correct).

As a corollary to this principle, even if the trial court used an erroneous theory in suppressing the evidence herein, this Court must nevertheless affirm because of the presumption of correctness. This presumption requires that a trial court's ruling be affirmed, even if the trial court employed an erroneous legal theory, so long as there is a valid legal theory consistent with the facts that does support the result reached by the trial court. *Caso v. State,* 524 So. 2d 422 (Fla. 1988); *Robinson v. State,* 393 So. 2d 33 (Fla. 1st DCA 1981); *Savage v. State,* 247 So. 2d 433 (Fla. 1st DCA 1971).

As will be demonstrated below, the facts of this case support the result reached by the trial court, under the theories that the initial vehicle stop was pretextual, that appellee was unlawfully detained after the traffic warning was issued, that appellee did not freely and voluntarily consent to a search of his vehicle, and the scope of the search exceeded any purported consent.

1. Pretextual Stop

In order to justify an investigatory stop for a traffic violation, the officer conducting the stop must have a reasonable, founded suspicion of criminal activity. Section 901.151, Florida Statutes; *Rollins v. State,* 578 So. 2d 850 (Fla. 2d DCA 1991); *Adams v. State,* 523 So. 2d 190 (Fla. 1st DCA 1988). A bare suspicion of criminal activity is insufficient. *Daniels v. State,* 543 So. 2d 363 (Fla. 1st DCA 1989).

At the suppression hearing below, Deputy Troiano testified that he stopped appellee's vehicle because it was weaving over the center line of the interstate, and he "felt confident that there was either an impairment, either by intoxication, tiredness or other substance of some sort" (T 6-7). Troiano based this conclusion on "[j]ust his driving pattern itself. The way he could not maintain his vehicle along the road. I just felt very unsecure and unsafe about that; and effected the stop" (T 7), although there were no other indicators that the driver was impaired (T 28-29). Troiano observed the vehicle for one mile to one and a half miles, or approximately one minute (T 6, 27-28), before making the stop. He had no difficulty pulling over the vehicle (T 7) and quickly determined that appellee was not impaired (T 9, 29-30). Appellee produced his driver's license and vehicle registration, and explained that he was distracted by his passenger in the front seat, which explanation the officer apparently accepted (T 7-8). Troiano said he was satisfied in issuing a warning citation for failure to maintain a single

lane and claimed he had no other reason for initiating the stop (T 9). When asked if he routinely issued warnings or citations when he observed "that driving pattern," Troiano responded, "It depends. I'll use a mixture: Either verbal, written or an actual citation — Florida Uniform Traffic Citation" (T 9).

Before completing the warning citation, however, Troiano approached the passenger, Daria Wilson, who was still seated in the vehicle "to check on her safety, making sure everything was okay between the two" (T 10). He said Wilson appeared nervous and was evasive about their destination. He had to get closer to her in order to hear because she was speaking softly and, as he did so, he saw a package of rolling papers in her pocket (T 10-11). Troiano then called Sgt. Lee for back-up. He summoned back-up before he gave the warning citation to appellee (T 31).

This testimony wholly fails to establish that appellee's vehicle would have been stopped absent an invalid purpose.

The seminal case on pretextual stops in Florida is *Kehoe v. State,* 521 So. 2d 1094 (Fla. 1988). In resolving a conflict regarding the validity of traffic stops where the real motivation of suspicion of drug activity, the *Kehoe* Court adopted an objective test for determining whether an officer's reasons for stopping a car are pretext. The Court reasoned: "[S]ubjective intent is not controlling — the appropriate analysis is whether a reasonable officer would have stopped the car absent an additional invalid purpose." *Id.* at 1096. Whether a reasonable officer would have stopped appellee's car thus turns on a consideration of all of the facts and circumstances confronting the officer at the time of the initial stop. *Id.*, at 1097.

Deputy Troiano observed appellee's vehicle at 10:00 p.m., heading south on the interstate and noted that the vehicle was weaving six to ten inches over the center line (T 6).

Troiano followed the car or only 45 to 70 seconds (T 28), when he put on his blue lights and stopped the car. Other than this slight "serpentine" weave (T 6) for only a minute or so, there were no indications that the driver was impaired, and the driver was not speeding.

Based on these facts, a reasonable officer would not have stopped Ponder's car, absent an additional invalid purpose. It is not reasonable for an officer to stop a vehicle traveling 60 miles an hour (within the speed limit) for failure to maintain a single lane after observing it for only a minute or so. *See State v. LaGree,* supra (pulling out of parking lot and driving one-half of a city block before putting on headlights is not such a circumstance that it can be assumed, without proof, that a reasonable police officer would make the stop); *Tragaczewski v. State,* 590 So. 2d 542 (Fla. 2d DCA 1991) (officer following car for eleven blocks before making stop is a factor in rendering stop pretextual); *and Monroe v. State,* 543 So. 2d 298 (Fla. 2d DCA 1989) (state failed to carry its burden of demonstrating that a reasonable officer on drug patrol would make a traffic stop for a bald tire). Despite the fact that Troiano had made four or five traffic stops for weaving in the past four years, there was no evidence presented below that other officers had similarly stopped cars for weaving on the interstate at night after observing them for only a short distance. Troiano did not think it necessary to cite appellee for careless driving, and he could not even recall how many other cars were in the vicinity when he observed appellee's car on the highway ["His, and mine and perhaps several others.... I'm not really — the only thing I can really be positive of is his car and my car"] (T 33-34). Most significantly, Troiano admitted that he summoned Sgt. Lee as back-up before handing the warning citation to appellee, further bolstering appellee's contention that the officer had some other motive for effectuating the traffic stop.

The *Kehoe* analysis assumes that a stop for a minor traffic infraction is grounded upon the requisite reasonable suspicion that the motorist is violating a traffic law. However, *Kehoe* requires a determination of whether a reasonable officer would have stopped the car anyway, absent any invalid purpose. Here, the only proof was that Deputy Troiano had made other similar stops. It does not follow that a reasonable officer would have done so. The state plainly failed to adduce facts to support its position that this stop was not pretextual. Moreover, the court below found that the initial stop was valid but failed to address the second prong of the *Kehoe* analysis, whether a reasonable officer would have nevertheless made the stop, absent any improper purpose. Again, *Kehoe* is based upon the assumption that the stop for a minor traffic violation is predicated upon the requisite reasonable suspicion. Thus, the trial court did not employ the correct legal analysis in concluding that the stop was not a pretext. Based on the above, this Court should either affirm because of the presumption of correctness or relinquish jurisdiction to the trial court for the purpose of obtaining a ruling on the question of whether a reasonable officer would have stopped appellee, absent an invalid purpose.

2. Continued Detention of Appellee and His Passenger

Assuming *arguendo* that the initial traffic stop was valid, the continued detention of Mr. Ponder for a time exceeding that necessary to issue the citation was improper. Thus, the search conducted during the illegal detention was also illegal and the cocaine and marijuana found as a result of the search were properly suppressed.

As appellant acknowledges, the Florida Supreme Court has held that a traffic stop "must last no longer than the time it takes to write the traffic citation." *Cresswell v. State* 564 So. 2d 480, 481 (Fla. 1990), *citing, State v. Anderson,*

479 So. 2d 816, 818 (Fla. 4th DCA 1985). In order to justify a continued detention longer than it takes to write a traffic ticket or citation, the officer must have a reasonable suspicion "based on articulable facts that criminal activity 'may be afoot.'" *Cresswell V. State,* 564 So. 2d at 481, *citing, Terry v. Ohio,* 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889 (1968). As Deputy Troiano did not have a *reasonable* suspicion of criminal activity, the continued detention of appellee was illegal.

In *State v. Anderson, supra,* the defendant was stopped for speeding, and then his car was detained awaiting the arrival of a drug-sniffing dog. The Fourth District, quoting the circuit court's written order, said:

> The original stopping of Mr. Anderson's vehicle for a speeding ticket was entirely proper. A detention of one-half hour on the Turnpike is probably not unreasonable in and of itself. The question is whether or not the officer had a founded suspicion to detain Mr. Anderson and his car or whether under the facts here this was simply a mere or bare suspicion. [Citations omitted].
>
> A proper stop cannot enlarge the length of detention for the stop should be no longer than it takes to write out the traffic citation.

Id., at 818.

Once an officer has concluded his investigation for the traffic offense, he does not have the right to "check out the passengers." *Bailey v. State,* 319 So. 2d 22, 26 (Fla. 1975). In *Bailey,* after making a traffic stop, the officer spoke with the driver and determined there had been no traffic violation. The officer then went over to the passengers and asked them for identification. In an effort to produce identification, one of the passengers exited the car, and as he did, the officer

saw a plastic bag protruding form underneath the leg of another passenger. The officer seized the bag which contained contraband. The Court held that the officer erred in continuing the detention and in asking the passengers for identification.

In *L.W. v. State,* 538 So. 2d 523 (Fla. 3d DCA 1989), an officer pulled up next to a car at an intersection in Miami at 11:00 p.m. The car was occupied by four black males; L.W. was one of the passengers. The car pulled away form the intersection slowly (20 mph in a 35 mph zone), which led the officer to believe the driver might be under the influence of alcohol or drugs. The officer observed a temporary tag inside the rear window and believed Florida law required the tag to be on the rear bumper. The occupants kept turning around to look at him. The officer decided to pull the car over and called for a back-up. Once the car was stopped, the officer checked the driver's license and registration and noticed that the back seat moved forward somewhat. The driver's documents proved to be in order and no traffic citations were issued. When back-up arrived, the officer ordered all the occupants out of the car, lifted the rear seat and found a loaded firearm under L.W.'s seat. All the occupants were arrested.

On appeal, the court ruled:

> As far as the officer's right to initiate or conduct an investigatory stop is concerned, the observations relied upon by the officer were not sufficient to form a founded suspicion that criminal activity existed.

Id., at 524, citing *Kehoe v. State, supra.* The court concluded:

> We find that whatever justification the officer had to make the initial traffic stop, based upon his inability to read the tag's expiration date,

> dissipated once the officer determined the driver's license and registration documents were in order. At that point, L.W. should have been allowed to proceed on his way.

Id., at 524-525. The court held that the evidence derived from the search should have been excluded and that the trial court erred denying the motion to suppress.

Likewise here, Deputy Troiano illegally detained appellee longer than the time it took to write the warning citation by approaching the passenger "to check on her safety" after verifying appellee's driver's license and vehicle registration and deciding to issue the warning. Troiano illegally detained him further after releasing him from the traffic stop and advising him to drive carefully, by asking if he had any guns, weapons, drugs or contraband and requesting consent to search the car. As in *Bailey* and *L.W.*, Ponder should have been permitted to go once the traffic matter was resolved. Yet, Deputy Troiano detained him for the sole purpose of effectuating a search of the vehicle without any reasonable suspicion of criminal activity.

Dunbar v. State, 592 So. 2d 1230 (Fla. 2d DCA 1992), is on point. There, Dunbar was stopped because his car was making noise. The officer asked about the noise, but he did not issue a citation. After checking Dunbar's license and registration, the officer returned them to Dunbar, told him he was free to go and wished him luck on his journey. As Dunbar returned to his vehicle, the officer called to him and requested permission to search to car. In concluding that the continued detention was illegal and rendered illegal the ensuing search, the appellate court reasoned:

> Notwithstanding the 'request' [to search] the defendant was obviously detained because he was not free to go. The officer had no articulable evidence of criminal activity to justify the detention

> of defendant after the officer had been satisfied that no traffic violation had occurred and that defendant's documents were in order. The continued detention of defendant thereafter was illegal, thus rendering illegal the search. *See Joseph v State,* 588 So. 2d 1014 (Fla. 2d DCA Oct. 11, 1991). *See also Cresswell v. State,* 564 So. 2d 480 (Fla. 1990).

592 So. 2d at 1231.

The premise of appellant's argument, that Deputy Troiano had a reasonable suspicion of some on-going criminal activity to justify the continued detention is belied by the state's own evidence. Deputy Troiano unequivocally testified that prior to approaching the passenger he had no reason to suspect appellee was engaged in narcotics activity (T 10). Troiano's conversation with the passenger and observation of the rolling papers in her pocket provided no further justification for a continuing detention. For one thing, Troiano had no justification for even questioning Ms. Wilson and "check[ing] on her safety." *See Bailey v. State, supra* (once an officer has concluded his investigation for a traffic offense, he has no right to check out the passengers); *and Jenkins v. State,* 567 So. 2d 528 (Fla. 5th DCA 1990) (once officer stopped the driver and required him to leave his car, officer had no justification for returning to inspect the now vacant vehicle); *see also, Cooper v. State,* 548 So. 2d 1124 (Fla. 4th DCA 1991). Moreover, the rolling papers in Ms. Wilson's pocket were not contraband *per se* and could not give rise to a reasonable suspicion of criminal activity absent other incriminating circumstances. *See Caplan v. State,* 531 So. 2d 88 (Fla. 1988) (observation of opaque containers, such as hand-rolled cigarette papers, will not create probable cause to search in absence of other factors); *Anderson v. State,* 532 So. 2d 5 (Fla. 2d DCA 1988) (observation of small cut straw on floor of vehicle, without any other indications of criminal activity, insufficient to create

probable cause for search of car); *Carr v. State,* 353 So. 2d 958 (Fla. 2d DCA 1978) (two hand-rolled cigarettes twisted shut at the ends were not contraband which would give rise to probable cause for search). Clearly, if the observation of hand-rolled cigarette papers in insufficient to justify a search, the observation of papers alone, without any other indicia of criminal activity, cannot give rise to either reasonable suspicion or probable cause to search. Indeed, the officer here released appellee from the traffic stop and told him he was free to leave *after* observing the rolling papers in the passenger's pocket.

Despite this obvious lack of reasonable suspicion, Deputy Troiano requested back-up *before* handing the warning to Ponder, and detained appellee and his passenger for the sole purpose of conducting a search of their vehicle. This continued detention was patently illegal.

It is the state's burden to show that there existed no "continued illegal detention." *Castillo v. State,* 536 So. 2d 1134, 1136 (Fla. 2d DCA 1988). Under the facts here, the state failed to show that appellee and Ms. Wilson were free to leave once the traffic matter was concluded. To the contrary, Deputy Troiano testified that as Ponder "approached his vehicle, very close to his vehicle" (T 12), the officer called out to him and asked to search the car, then placed appellee and his passenger in the patrol car while the search was conducted. Appellee was not under arrest, according to Troiano, but neither was he free to leave (T 35). The state failed to prove that this detention was lawful.

3. Voluntariness of Consent

As demonstrated above, appellee was illegally detained and any purported consent to search the vehicle was thus tainted by the illegal detention.

Whether consent is voluntarily given is a question of fact to be determined from the totality of circumstances. *Reynolds v. State,* 592 So. 2d 1082 (Fla. 1992). Under ordinary circumstances, the voluntariness of consent to search must be established by a preponderance of the evidence. *Denehy v. State,* 400 So. 2d 1216 (Fla. 1980), *and State v. Blan,* 489 So. 2d 865 (Fla. 1st DCA 1986). However, when consent has been obtained after prior illegal conduct by the police, such as an invalid detention or arrest, the police misconduct presumptively taints and renders involuntary any consent subsequently obtained. In such a case, the state has the burden of proving by clear and convincing evidence that the consent was freely and voluntarily given and not merely deference to the apparent authority of the police. *Reynolds v. State, supra; Norman v. State,* 379 So. 2d 643 (Fla. 1980); *Bailey v. State,* 319 So. 2d 22 (Fla. 1975); *Thompson v. State,* 555 So. 2d 970 (Fla. 2d DCA 1990); *State v. Butler,* 520 So. 2d 325 (Fla. 3d DCA 1988); *Murtha v. State,* 355 So. 2d 180 (Fla. 3d DCA 1978).

The facts here show that consent was not freely and voluntarily given. Deputy Troiano stopped Ponder after he had been released from the traffic stop and inquired about guns, weapons or drugs in the vehicle. Troiano never advised Ponder that he was then free to leave or that he could refuse to consent to a search but implied that he had a right to conduct such search. Clearly, there was not an unequivocal break between the illegal detention and Ponder's subsequent consent to search to dissipate the taint of the illegal action. *Norman v. State, supra.* As recognized by the Supreme Court in *Bailey v. State, supra,* at 27-28:

> There may be a few rare instances in which a valid consent could be made after an illegal arrest, provided that circumstances were so strong, clear and convincing as to remove any doubt of a truly voluntary waiver.

The closer the connection between the consent and the police misconduct, the less likely the consent will be found to be freely and voluntarily given. *Alvarez v. State,* 515 So. 2d 286 (Fla. 4th DCA 1987). *Accord, Bailey v. State, supra* at 28 ("In many instances, the exploitation is accomplished with the performing of the [illegal] actions."). Here, the alleged consent followed immediately on the heels of the illegal detention.

In determining whether appellee's consent to search was freely and voluntarily given, the trial court was required to assess the totality of all the circumstances surrounding the consent, including the lack of any advice of his constitutional rights. *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L. Ed. 2d 854 (1973); *Acosta v. State,* 519 So. 2d 658 (Fla. 1st DCA 1988). Furthermore,

> A distinction is recognized in the law between submission to the apparent authority of a law enforcement officer and unqualified consent. Mere acquiescence in a search is not necessarily a waiver of a valid search warrant. Rather for a person to waive his search and seizure rights, it must clearly appear that he voluntarily permitted or expressly invited and agreed to the search.

Taylor v. State, 355 So. 2d 180, 183 (Fla. 3d DCA 1978). *See also, Bailey v. State, supra,* at 27; *Ingram v. State,* 364 So. 2d 821, 822 (Fla. 4th DCA 1978).

The evidence below totally failed to establish a free and voluntary consent to search as opposed to a mere acquiescence to the apparent authority of Deputy Troiano. Troiano stopped Ponder for a traffic violation, failure to maintain lanes, and after writing a warning citation but before handing it to him, requested a back-up unit. Troiano then handed the citation to Ponder, along with his driver's license, and then "told him to please drive carefully the remainder of his

trip" (T 12). As Ponder returned to his vehicle, Troiano asked him for consent to search. Troiano testified as follows:

> Q [Prosecutor] Please do that [ask him for consent] for the record, exactly the same way that you did it. What did you say to him at that time?
>
> A [Troiano] "Mr. Ponder, I'd like to ask you if you have any guns, any weapons, any drugs or contraband in your car."
>
> At that point Mr. Ponder appeared frightened or scared; and he kind of staggered back from me a little bit. And he state, "Yes, you can search the car," and "No," he didn't have any drugs in his car.

(T 12).

It is apparent from this dialogue that Troiano did not so much ask for consent as demand it, and Ponder did not believe he had a right to refuse consent. Furthermore, at no time was Ponder advised of his right to refuse consent to the search.

Although there is no per se requirement that a defendant must be informed of his right to refuse a warrantless search, *Schneckloth v. Bustamonte, supra,* the failure of a officer to advise the defendant of such right is a factor to be considered in assessing the totality of the circumstances on the issue of voluntariness. *Acosta v. State, supra; Taylor v. State, supra*. In the context of this case, such factor takes on a particular significance in light of the pretextual stop and illegal detention which preceded the purported consent to search, as well as the fact that Troiano had already summoned a back-up unit. As recognized in *Taylor v. State, supra,* at 185:

> Such an advisement [of the right to refuse consent] by the officer given prior to the challenged consent might very well have broken the chain of presumptive coercion created by the prior illegal search;

> conversely, the absence of such a warning lends further credence to our conclusion that the chain of illegality herein was in no way broken.

Considering the totality of the circumstances, appellee's purported consent must be considered a mere acquiescence to the apparent authority of the officer rather than a knowing, voluntary consent. *See Ingram v. State,* 364 So. 2d 821 (Fla. 4th DCA 1978) (submission to apparent authority of police officer by silently handing over a bag does not affirmatively show consent to search). Appellee, figuratively speaking, silently handed over the car to Deputy Troiano, "merely a reflexive submission to [the officer's] apparent authority, which was from its inception, impermissible." *State v. Castillo,* 545 So. 2d 965, 967 (Fla. 3d DCA 1989). The state failed in its burden of establishing by clear and convincing evidence a free and voluntary consent to the search.

4. Scope of Search

The standard of measuring the scope of a suspect's consent under the Fourth Amendment has been defined as "objective" reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Florida v. Jimeno,* 500 U.S. ___, 111 S.Ct. ___, 114 L. Ed. 2d 297 (1991). Appellant mistakenly interprets this standard to mean that when a suspect does not place explicit limitations on his consent to search, the scope of the search is unrestricted (IB 18-19). To the contrary, a consensual search is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *State v. Wells,* 539 So. 2d 464 (Fla. 1989), *Approved on other grounds, Florida v. Wells,* 495 U.S. ___, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *Robertson v. State,* 559 So. 2d 434 (Fla. 1st DCA 1990). As noted in *State v. Wells,* 539 So. 2d at 467, when the police are relying upon consent to conduct a warrantless search, they have no more authority

than that reasonably conferred by the terms of the consent. It that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis. *Id.*

In *Robertson v. State, supra,* the defendant was lawfully stopped on Interstate 10 for speeding. When the defendant and his passenger gave conflicting stories about their destination, the officers requested permission to search the vehicle. The officers did not indicate they would be looking for narcotics. The defendant consented to the search by opening the trunk and saying, "there it is." 550 So. 2d at 435. There was no other discussion between Robertson and the officers concerning the scope of consent of whether Robertson's consent extended to the opening of closed containers within the car. Cocaine was found in a closed, zippered bag in the trunk.

Similarly, here, appellant was stopped for a traffic violation, and there were no other incrimination circumstances to indicate a narcotics violation. Troiano merely asked appellant if he had "any guns, any weapons, any drugs or contraband," and if he would consent to a search of the vehicle. This was not an express search for narcotics, as in *Florida v. Jimeno,* nor was the cocaine found in a paper bag lying on the floor or the car, as in *Jimeno.* Further, appellee being unaware of the object of the search, it cannot be assumed that his consent to search extended beyond the surface of the vehicle's interior. Nor is it reasonable for an officer to consider general consent to search a vehicle to include authority to forcibly remove a customized panel attached to the body of the car. *State v. Wells, supra* (general consent to search automobile trunk did not constitute permission to pry open a locked piece of luggage found inside).

Appellant would convert this supposed consensual search to a probable cause search or a search incident to arrest

because Troiano found marijuana residue on the floorboard by the front passenger seat. Both of these contentions, however, presuppose that the initial stop and continued detention of appellee were lawful, and further that probable cause existed for the search and/or arrest. As discussed, *supra,* neither the traffic stop nor the continued detention were lawful, and absent a voluntary consent to search, there was no justification for searching the vehicle.

Admittedly, if probable cause exists to justify the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle, including any container found inside. *See United States v. Ross,* 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d (1982). *Ross,* however, did not involve a consensual search, and it is blatantly apparent from the testimony presented below that the only possible basis for the instant search was Deputy Troiano's belief that appellee consented to it:

> Q. Based upon your being there, and knowing what you asked him and hearing his response, it is your opinion that he...understood at the time what you were asking him?
>
> A. Most definitely, yes, sir.
>
> Q. Is it your opinion, based upon the totality of the circumstances, that the consent he gave you to look in his car was freely and voluntarily given on his part?
>
> A. Yes, sir.
>
> Q. What did you do next?
>
> A. At the point I asked him to stand at the front of my car, as I made contact with the passenger.
>
> I informed her of the situation at that point, that I had a consent to a search of he vehicle. And I

asked her if she had any property that belonged to her in the car....

* * * *

Q. What occurred at that point?

A. I asked her to step back also to the vehicle.

And somewhere in that time frame, I asked for a back-up officer. Sergeant Lee arrived several minutes later. And I hesitated to search the vehicle until he was present with me, for security purposes. Once he arrived, I started the search of the vehicle.

(T 13-14). Under no circumstances can this search be construed as either a probable cause search or as a search incident to a lawful arrest.

Deputy Troinao never claimed he had a reasonable suspicion of criminal activity, let alone probable cause to either search or arrest appellee and his passenger. Any probable cause arose, if at all, after the invalid consensual search was commenced.[3] Thus, the search here cannot be sustained under the rationale of *Ross, see Robertson v. State, supra,* or as a search incident to arrest under *New York v. Belton,* 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

A search may not be validated merely by what it produces. *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *Shaw v. State,* 611 So. 2d 552 (Fla. 1st DCA 1992). Because the state failed to show that the search here was not the product of either an illegal detention or invalid consent, the search was unlawful and the cocaine and marijuana seized during the illegal search was properly suppressed. The trial court's order should be affirmed.

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3 It is noteworthy that Deputy Troiano did not seize the insubstantial amount of marijuana residue he allegedly found in the front passenger area of the car, and, in fact, never showed it to Sgt. Lee (T 35, 36).

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, appellee requests this Court to affirm the trial court's order granting his motion to suppress.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Laura Rush, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Florida, 32301; and a copy has been mailed to appellee, Mr. Johnny Ponder, on this 9th day of August, 1993.

PAULA S. SAUNDERS